

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,  
Plaintiff,  
  
v.  
  
JOHN THAT LUONG,  
  
Defendant.

CR. NO. 2:99-00433 WBS

MEMORANDUM AND ORDER RE:  
DEFENDANT'S MOTION TO DISMISS  
COUNTS TWO, THREE, FIVE, SEVEN,  
AND NINE

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Presently before the court is defendant John That Luong's motion to dismiss counts two, three, five, seven, and nine of the Indictment pursuant to Federal Rule of Criminal Procedure 12(b)(2) in light of the recent Supreme Court decision, Johnson v. United States, 135 S. Ct. 2551 (2015). (Docket No. 1686.) Counts two, five, seven, and nine charged Luong with the use of a firearm during a crime of violence, 18 U.S.C. § 924(c),

1 and identified the crime of violence as conspiracy to commit  
2 Hobbs Act robbery, 18 U.S.C. § 1951(a).<sup>1</sup> (Indictment (Docket No.  
3 1).) Count three charged Luong with death caused by use of a  
4 firearm during a crime of violence, that is, conspiracy to commit  
5 Hobbs Act robbery. (Id.)

6 To avoid repetition, the court will refrain from  
7 reciting the factual and procedural background, the court's  
8 analysis of Johnson, and the court's application of Johnson to  
9 the residual clause of § 924(c), all of which remain the same as  
10 in its February 1, 2016 Order granting co-defendants Thongsouk  
11 Theng Lattanaphom and Minh Huynh's motion to dismiss. (Feb. 1,  
12 2016 Order (Docket No. 1659); Am. Feb. 1, 2016 Order (Docket No.  
13 1668).)

14 The court reiterates that it has jurisdiction over  
15 Luong's motion to dismiss under Rule 12, as amended in 2014.  
16 Rule 12(b)(2) provides that "[a] motion that the court lacks  
17 jurisdiction may be made at any time while the case is pending."  
18 Fed. R. Crim. P. 12(b)(2). Luong is challenging this court's  
19 jurisdiction by arguing that the statute under which he was  
20 convicted, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally void  
21 for vagueness. (Def.'s Mot. at 5-6 (Docket No. 1686).) Further,  
22 Luong's case is pending before this court because it was remanded  
23 by the Ninth Circuit for resentencing. (Ninth Cir. Mandate  
24 (Docket No. 1623); see Feb. 1, 2016 Order at 3-6); see also  
25 United States v. Rios-Hernandez, Cr. No. 3:93-00091 HDM, 2013 WL

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26 <sup>1</sup> The Ninth Circuit remanded with instructions to vacate  
27 the conviction and sentence corresponding to count two and, as a  
28 result, the court must vacate count two irrespective of  
defendant's motion.

1 4857952, at \*1 (D. Nev. Sept. 10, 2013) (holding a "case is no  
2 longer 'pending' within the meaning of Rule 12(b) after the  
3 judgment becomes final."); Clay v. United States, 537 U.S. 522,  
4 525, 527 (2003) (finding a judgment of conviction becomes final  
5 in the context of post-conviction relief when the Supreme Court  
6 affirms the conviction and sentence on the merits or denies a  
7 timely filed petition for certiorari, or when the time for  
8 seeking certiorari review expires); United States v. Colvin, 204  
9 F.3d 1221, 1222-25 (9th Cir. 2000) (finding that a judgment  
10 becomes final in the context of post-conviction relief when the  
11 time has passed for appealing the district court's entry of  
12 judgment or entry of amended judgment on remand).

13         The court is unpersuaded by the government's argument  
14 that conspiracy to commit Hobbs Act robbery is a crime of  
15 violence under the force clause of § 924(c) and, as a result, the  
16 constitutional question of whether the residual clause is void  
17 for vagueness can be avoided altogether. (Gov't Opp'n at 9, 12  
18 (Docket No. 1688).) Under the force clause, a crime of violence  
19 is a felony that "has as an element the use, attempted use, or  
20 threatened use of physical force against the person or property  
21 of another." 18 U.S.C. § 924(c) (3) (A).

22         The three elements of conspiracy to commit Hobbs Act  
23 robbery are: "(1) two or more people agreed to commit a robbery  
24 or extortion of the type discussed in the Hobbs Act; (2) the  
25 defendant had knowledge of the conspiratorial goal; and (3) the  
26 defendant voluntarily participated in trying to accomplish the  
27 conspiratorial goal." United States v. Si, 343 F.3d 1116, 1123-  
28 24 (9th Cir. 2003). An overt act in furtherance of the goal of

1 the conspiracy is not required. United States v. Dennis, Civ.  
2 No. 11-141 BLG RFC, 2013 WL 704482, at \*7 (D. Mont. Feb. 27,  
3 2013), aff'd, 569 Fed. Appx. 533 (9th Cir. 2014) ("Unlike the  
4 crime of attempted robbery to affect commerce, to convict  
5 [defendant] of conspiracy to commit robbery affecting commerce  
6 under 18 U.S.C. § 1951(a), the United States need not prove  
7 [defendant] took a 'substantial step' towards the commission of  
8 the crime.").

9 The jury instructions in this case defined conspiracy  
10 to commit Hobbs Act robbery as:

11 [A] kind of criminal partnership - an agreement of two  
12 or more persons to commit one or more crimes. The  
13 crime of conspiracy is the agreement to do something  
14 unlawful; it does not matter whether the crime agreed  
15 upon was committed. . . . You must find that there was  
16 a plan to commit robbery which if successful would have  
affected interstate or foreign commerce as an object of  
the conspiracy, with all of you agreeing on the  
particular crime which the conspirators agreed to  
commit.

17 (Jury Instruction No. 27 (Docket No. 1071).) The jury was  
18 therefore not required to find that Luong used, attempted to use,  
19 or threatened to use physical force in order to find him guilty  
20 of conspiracy. (Id.)

21 The Ninth Circuit has never held that conspiracy to  
22 commit Hobbs Act robbery is a crime of violence under the force  
23 clause. In United States v. Mendez, 992 F.2d 1488 (9th Cir.  
24 1993), the Ninth Circuit held that conspiracy to commit Hobbs Act  
25 robbery qualifies as a crime of violence under the residual  
26 clause. Id. at 1491. The defendants in Mendez were indicted for  
27 conspiring to commit Hobbs Act robbery and carrying or using a  
28 firearm in the commission of a crime of violence under § 924(c).

1 Id. at 1489. The Ninth Circuit analyzed whether conspiracy to  
 2 commit Hobbs Act robbery is a crime of violence using a modified  
 3 categorical approach. It found that a modified categorical  
 4 approach was necessary because a "person may be convicted for  
 5 violating § 1951 if he interferes with interstate commerce by [1]  
 6 robbery, [2] extortion, [3] attempting or [4] conspiring to rob  
 7 or extort, or [5] committing or threatening violence in  
 8 furtherance of a plan or purpose to violate the statute." Id. at  
 9 1490. The Ninth Circuit found that the Hobbs Act is therefore a  
 10 divisible statute that describes "crimes of both violence and  
 11 non-violence." Id.

12 The Ninth Circuit explained that Hobbs Act robbery  
 13 "indisputably qualifies as a crime of violence" because it  
 14 contains an element of "actual or threatened force, or  
 15 violence."<sup>2</sup> Id. It further reasoned that "where conspirators  
 16 agree to use 'actual or threatened force, or violence' to obtain  
 17 personal property from another, § 1951(b)(1), the risk that  
 18 physical force may be used in the course of the conspiracy is  
 19 substantial within the meaning of § 924(c)(3)(B)." Id. at 1492.  
 20 The Ninth Circuit therefore concluded that, because of this  
 21 substantial risk, a conspiracy to commit Hobbs Act robbery is a  
 22 crime of violence under the residual clause, or subsection (B).<sup>3</sup>

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 24 <sup>2</sup> The Hobbs Act defines robbery as "the unlawful taking  
 25 or obtaining of personal property from the person or in the  
 26 presence of another, against his will, by means of actual or  
 27 threatened force, or violence, or fear of injury, immediate or  
 28 future, to his person or property, or property in his custody or  
 possession, or the person or property of a relative or member of  
 his family or of anyone in his company at the time of the taking  
 or obtaining." 18 U.S.C. § 1951(b)(1) (emphasis added).

<sup>3</sup> Several other circuits have also found that conspiracy to

1 It made clear, however, that it was "not address[ing] whether  
 2 conspiracy to rob in violation of § 1951 is a 'crime of violence'  
 3 under subsection (A)," or the force clause. Id. at 1491.

4 The court therefore finds that conspiracy to commit  
 5 Hobbs Act robbery does not have as an element the use or  
 6 attempted use of physical force and is not a crime of violence  
 7 under the force clause. If it were not for Johnson, this court  
 8 would be compelled to conclude, as the Ninth Circuit did in  
 9 Mendez, that conspiracy to commit Hobbs Act robbery is a crime of


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10 commit Hobbs Act robbery is a crime of violence under the  
 11 residual clause. See United States v. Elder, 88 F.3d 127, 129  
 12 (2d Cir. 1996) (finding conspiracy to commit Hobbs Act robbery to  
 13 be a crime of violence under the residual clause because "such a  
 14 meeting of the minds enhances the likelihood that the planned  
 15 crime will be carried out" and "when a conspiracy exists to  
 16 commit a crime of violence . . . the conspiracy itself poses a  
 17 'substantial risk' of violence"); United State v. Turner, 501  
 18 F.3d 59, 67-68 (1st Cir. 2007) (reasoning that "the object of the  
 19 conspiracy is the critical determinant of its nature" and  
 20 concluding that conspiracy to commit Hobbs Act robbery is a crime  
 21 of violence under the residual clause even though there is no  
 22 overt act requirement); United States v. Phan, 121 F.3d 149, 152-  
 23 53 (4th Cir. 1997) (finding that "Hobbs Act conspiracy to commit  
 24 robbery, however, is a separate crime of violence providing its  
 25 own predicate for § 924(c)(1) liability" and citing Elder as  
 26 "holding that Hobbs Act conspiracy to commit armed robbery is by  
 27 definition a felony involving substantial risk that physical  
 28 force may be used and therefore is a proper predicate for a  
 § 924(c)(1) conviction"); United States v. Taylor, 176 F.3d 331,  
 337-38 (6th Cir. 1999) ("[A] conspiracy to commit a robbery that  
 violates the Hobbs Act is necessarily a conspiracy that, by its  
 nature, involves a substantial risk that physical force may be  
 used against the person or property of another, and therefore is  
 a crime of violence within the meaning of section 924(c)."). But  
 see United States v. Redmond, Cr. No. 3:14-00226 MOC, 2015 WL  
 5999317, \*4 (W.D.N.C. Oct. 13, 2015) (looking to the indictment,  
 which charged the defendant with conspiring to obstruct, delay,  
 and affect commerce by robbery, by taking, or by conspiring to  
 take personal property from victims "against their will and by  
 means of actual and threatened force, violence, and fear of  
 immediate and future injury," and concluding that the underlying  
 conviction included "as an essential element 'physical violence'  
 or 'a threat of physical violence'" and was therefore a crime of  
 violence under the force clause).

1 violence under the residual clause. However, because the court,  
2 for all the reasons explained in its previous Order (See Feb. 1,  
3 2016 Order at 10-13), concludes that the residual clause is  
4 unconstitutional under Johnson, the court must grant defendant's  
5 motion to dismiss.

6 IT IS THEREFORE ORDERED that defendant's motion to  
7 dismiss counts two, three, five, seven, and nine of the  
8 Indictment (Docket No. 1686) be, and the same hereby is, GRANTED.

9 Dated: April 20, 2016

  
10 WILLIAM B. SHUBB  
11 UNITED STATES DISTRICT JUDGE  
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